IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 19, 2007

JERRY D. CARNEY v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 97-D-2821 Cheryl Blackburn, Judge

No. M2006-01740-CCA-R3-CO - Filed October 17, 2007

The petitioner, Jerry D. Carney, after being convicted of first degree murder, filed a petition for a writ of error coram nobis, arguing that newly discovered evidence would have changed the result of his trial. The trial court dismissed the petition without an evidentiary hearing. On appeal, the petitioner challenges the summary dismissal of his petition. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Jerry D. Carney, Henning, Tennessee, Pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The lengthy history of the instant case began on August 13, 1997, when the petitioner killed Craig Cartwright. Following the petitioner's conviction for first degree murder, this court upheld his conviction on direct appeal, summarizing the facts of the offense as follows:

> On the night of August 13, 1997, the [petitioner], Jerry Carney, was "riding around" Nashville and drinking beer with his friends Eric Bradshaw, Mike Shane, Jimmy Womack, and Melia Gribble. Erin Harris, another friend, paged the [petitioner] and requested that he pick her up at 716 Virginia Avenue. On the way to

Virginia Avenue, Bradshaw remarked that he believed that someone who had a problem with his brother, someone named "Shane" or "Shawn," lived at that address.

Upon arriving at the residence, the four males exited the car and began urinating in the front yard. Bill Massey and Craig Cartwright walked out of the residence to investigate. The [petitioner] began asking several people, "Who is Shane?" Cartwright responded that he was Shane. Upon hearing Cartwright identify himself as Shane, the [petitioner] quickly walked back to the vehicle and sat in the back seat behind the driver.

Massey approached the car on the driver's side and noticed a gun on the seat near the [petitioner]. Massey asked if the [petitioner] had a problem. The [petitioner] replied that there was no problem. Massey then requested one of the beers that was located in the back seat. The [petitioner] handed Massey a beer. As soon as Massey touched the beer, the [petitioner] grasped the gun with both hands. Massey threw down the beer and grabbed the [petitioner], hoping to disarm him. Cartwright had moved to the passenger side of the car. Although Massey was in direct contact with the [petitioner], the [petitioner] never looked at Massey. Instead, the [petitioner] pulled the slide of the gun back twice and fired six shots into Cartwright who was standing near the open passenger door.

The [petitioner], Bradshaw, Shane, Womack, Gribble, and Harris sped away in the car to Bradshaw's house. The [petitioner] took a shirt and wiped the car, inside and out, in order to destroy evidence. He also removed a decal from the back glass of the car and tried to remove all of the spent shell casings from the car. The [petitioner] entered Bradshaw's house, removed his bloody clothes, and soaked them in water in the bathtub. He then went to sleep and slept until the next day when he was picked up by the police for questioning.

The [petitioner] testified that he shot Cartwright in self-defense. The [petitioner] stated that he was afraid of Massey and Cartwright because they were much larger than he. The [petitioner] claimed that Massey had grabbed the [petitioner] by the shirt collar prior to the [petitioner's] retreat to the car. The [petitioner] alleged that he feared Massey or Cartwright would hurt him or try to take his gun and use it against him.

State v. Jerry D. Carney, No. M1999-01139-CCA-R3-CD, 2000 WL 1335770, at **1-2 (Tenn. Crim. App. at Nashville, Sept. 15, 2000). Our supreme court denied permission to appeal on April 24, 2001.

On August 21, 2001, the petitioner filed a petition for post-conviction relief, and he filed an amended petition on December 19, 2001. The post-conviction court denied the petitions on July 15, 2002. The petitioner appealed, and this court affirmed the denial of post-conviction relief. See Jerry D. Carney v. State, No. M2002-02416-CCA-R3-PC, 2005 WL 351238, at *1 (Tenn. Crim. App. at Nashville, Feb. 14, 2005). Meanwhile, in 2004, the petitioner, much aggrieved with his conviction, filed a petition for a writ of habeas corpus, which petition was denied. This court affirmed the denial of habeas corpus relief. See Jerry D. Carney v. David Mills, Warden, No. W2004-01563-CCA-R3-HC, 2004 WL 2756052, at *1 (Tenn. Crim. App. at Jackson, Dec. 2, 2004). On September 10, 2004, the petitioner, doggedly pursuing a means to have his conviction overturned, filed his first petition for a writ of error coram nobis. The petition was dismissed on February 2, 2005, and this court affirmed the judgment of the trial court pursuant to Rule 20, Rules of the Court of Criminal Appeals. See Jerry D. Carney v. State, No. M2005-01904-CCA-R3-CO, 2006 WL 2206045, at *1 (Tenn. Crim. App. at Nashville, July 31, 2006).

On May 2, 2006, the petitioner filed a second petition for a writ of error coram nobis, alleging that during the hearing on the first petition for a writ of error coram nobis he learned that a .22 caliber gun listed on a police report was actually found inside the vehicle in which the fatal shooting had taken place. The petitioner claimed that the State had withheld that evidence and that if the jury had heard about the gun, the jury would have believed his claim of self-defense and would have found him not guilty. The trial court dismissed the petition, finding that this court's opinion on direct appeal talked about a gun, an indication that the existence of the gun was not newly discovered evidence. The court stated, "Not only is this instant petition filed outside the statute of limitations as was Petitioner's original petition for writ of error coram nobis, but Petitioner fails to raise any cognizable issues." On appeal, the petitioner challenges the dismissal of his second petition for a writ of error coram nobis.

II. Analysis

Tennessee Code Annotated section 40-26-105 (2003) provides:

> There is hereby made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith. . . . Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the

> trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

It is well-established that the writ of error coram nobis "is an *extraordinary* procedural remedy . . . [that] fills only a slight gap into which few cases fall." State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999). Generally, a decision whether to grant a writ of error coram nobis rests within the sound discretion of the trial court. State v. Hart, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995). Cumulative evidence will not justify the grant of a writ of error coram nobis. Id.

We note that a petition for a writ of error coram nobis must be filed within one year of the judgment becoming final in the trial court. Tenn. Code Ann. § 27-7-103 (2000). "A judgment becomes final in the trial court thirty days after its entry if no post-trial motions are filed. If a post-trial motion is timely filed, the judgment becomes final upon entry of an order disposing of the post-trial motion." Mixon, 983 S.W.2d at 670. The petitioner's petition for a writ of error coram nobis was filed on July 20, 2004, well outside the statute of limitations. The petitioner concedes that the petition was untimely, but he asks us to toll the statute of limitations because of due process concerns. We conclude that due process does not require tolling; however, in an attempt to forestall further complaint by the petitioner, we will briefly address the merits of the petitioner's claims. See Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001); see also Carney, No. M2005-01904-CCA-R3-CO, 2006 WL 2206045, at *4.

At the petitioner's first writ of error coram nobis hearing,[1] the petitioner challenged "newly discovered evidence" that was listed on two police reports, namely a hair and a shirt. The trial court found that the petitioner was aware or could have been aware of both pieces of evidence at the time of trial; therefore, the evidence did not qualify as "newly discovered evidence." On appeal, this court agreed. Carney, No. M2005-01904-CCA-R3-CO, 2006 WL 2206045, at *4. In the instant case, the petitioner claims that when Detective Brad Corcoran testified at the hearing on the first petition for a writ of error coram nobis, he said that a .22 caliber gun, which was listed on the same police report as the shirt, may have been found in the vehicle in which the fatal shooting took place. Our reading of Detective Corcoran's testimony does not lead us to the same conclusion. Moreover, our review reveals that the petitioner never claimed that he was denied access the police report prior to trial. As such, the petitioner was or could have been fully aware of the existence of the .22 caliber gun at the time of trial. Therefore, the gun is not "newly discovered evidence" warranting the issuance of a writ of error coram nobis. Further, at trial, witnesses testified that prior to the shooting, the victim put his hand near his waistband as if he were grabbing for a beeper or a gun. This testimony supported the petitioner's claim of self-defense. Nevertheless, the jury found the petitioner guilty of premeditated first degree murder. Additionally, the petitioner never alleged that the victim had a gun at the time of the fatal shooting; the petitioner's position at trial was that he feared the victim would overpower him and take the *petitioner's* gun to use against him. In our view, evidence

[1] The petitioner specifically moved this court to take judicial notice of the record of his direct appeal and his appeal of the denial of his first petition for a writ of error coram nobis. This court issued an order acknowledging that we would take judicial notice of the prior records.

regarding the gun listed on the police report would not have changed the verdict at trial. Accordingly, the trial court did not err in dismissing the petition for a writ of error coram nobis.

We note that the petitioner has submitted a "supplemental brief" in which he complains about the trial court's denial of his "Motion for a Complaint for Fraud upon the Court."[2] In the motion, the petitioner asserted that Dr. Bruce Levy committed aggravated perjury at the hearing on the first writ of error coram nobis when he testified that he had noted on the autopsy report that the victim was a black male because a hospital report indicated that the victim was a black male. The petitioner complained that the hospital report clearly stated that the victim was a white male; therefore, Dr. Levy must have been deliberately lying to the court.

Initially, we note that the petitioner did not raise this issue at the time of the hearing on the first petition for a writ of error coram nobis, nor did he raise the issue on his appeal of the denial of that petition. Regardless, we, like the trial court, recognize that the petitioner has exhaustively challenged the autopsy report, arguing that the report was of the wrong individual. In his post-conviction action, the petitioner complained about the report. The post-conviction court found that "the autopsy report presented at trial was clearly of the wrong victim. . . . [However,] the fact that the Petitioner shot the victim was not an issue, since the Petitioner's defense was self-defense. Furthermore, the Petitioner testified that he shot the victim." Carney, No. M2002-02416-CCA-R3-PC, 2005 WL 351238, at *8. Thus, the petitioner has already litigated the inaccuracy of the report. Any erroneous testimony by Dr. Levy concerning the allegedly inaccurate autopsy report are inconsequential to the outcome of the petitioner's trial. Moreover, the hospital report identifying the victim as a white male was submitted as an exhibit at the hearing on the first error coram nobis petition. As such, the court was well-aware of the information contained in the report and could determine whether the information supported Dr. Levy's testimony. The trial court did not err in denying the petitioner's motion on this issue.

III. Conclusion

Based upon the foregoing, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE

[2] The petitioner's motion is included on the record on appeal. However, the trial court's order denying the motion is not included in the official technical record and is instead merely attached as an exhibit to the petitioner's "supplemental brief." However, "documents attached to an appellate brief but not included in the record on appeal cannot be considered by this court as part of the record on appeal." Grover L. Dunigan v. State, No. E2005-01574-CCA-R3-PC, 2006 WL 433699, at *3 (Tenn. Crim. App. at Knoxville, Feb. 23, 2006), perm. to appeal denied, (Tenn. 2006); see also State v. Matthews, 805 S.W.2d 776, 783-84 (Tenn. Crim. App. 1990).